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State E-Discovery

Navigating Issues Surrounding Metadata and Authenticity

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It is surprising how few reported New York decisions there are concerning disputes over the production of electronic “metadata.”¹ For those attorneys not familiar with the term, *Aguilar v. Immigration & Customs Enforcement Div.*² defines

[m]etadata, frequently referred to as “data about data,” “[a]s electronically-stored evidence that describes the “history, tracking, or management of an electronic document.” *Id.* at 646. It includes the “hidden text, formatting codes, formulae, and other information associated” with an electronic document. (citation omitted) see also *Autotech Techs. Ltd. P’Ship v. AutomationDirect.com, Inc.*, 248 F.R.D. 556, 557 n.1 (N.D. Ill. 2008) (Metadata includes “all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records”). Although metadata often is lumped into one generic category, there are at least several distinct types, including substantive (or application) metadata, system metadata, and embedded metadata. *Sedona Principles 2d Cmt. 12a.*

A demand in litigation for the production of metadata needs to be clear and precise and, depending on the facts, surgical in nature and limited in scope. The implication of the failure to appropriately and timely seek the



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production of metadata when allegedly needed to establish a point was addressed in *Threadstone Advisors v. Success Apparel*.³ There, the court expressly noted that defendant’s “insinuation” that a certain list was generated for the purpose of litigation is an “argument the court will not consider and if it wanted to prove that the List (a spreadsheet, likely saved as an Excel or Word file) was created after-the-fact, it could have and should have sought the metadata for the file containing the list.”

However, the January 2016 decision in *Ruth Bronner and Zwi Levy Family Sprinkling Trust*,⁴ highlights that metadata, when produced, may not be that illusive “smoking gun” and it may not demonstrate what the

person seeking to rely upon it would like to establish. Metadata in *Bonner* was used in an attempt to question the authenticity of a certain document. Movant’s counsel stated that the metadata for what he “describes as ‘fake page 1 and page 2’ ... has not been lost and, as proof, he provides a printout of a screen shot of the screen in which the metadata ‘of the thumb drive’ appears indicating: ‘Date Modified: 5/16/1995 5:52 P.M.’” In response, opposing counsel stated that the thumb drive containing the metadata of the electronically stored document provided to movant’s counsel did “not reflect the original metadata for this document, as such original metadata no longer exists” “since even its ‘date of creation’

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shows a date of November 30, 2007, which correspond[s] to the date the law firm changed its document management system.” This case reveals a common mistake when analyzing metadata, as the metadata may not reflect accurate information concerning the *actual* date of the action that the reviewer is trying to analyze, such as when the electronically stored information (ESI) was, for instance, created, modified, printed or shared with others. This decision serves as a warning to law firms to be careful to maintain original ESI metadata when, for instance, changing document management systems or reviewing original client-provided ESI.

Below are four recent decisions providing examples of how metadata may be used to date and time when pictures and videos were actually taken and metadata’s use in determining whether the image taken accurately reflects the subject that was digitally recorded:

- *Libron v. Sunny* (defendants ordered to exchange the “metadata for photos of scene taken with tablet computer by defendants”).⁵

- *United States v. Kolokouris* (photographs submitted by the government include a time stamp generated from metadata in Whitt’s camera and the time stamps ranged between 1:01 p.m. and 2:26 p.m. and, as Whitt testified that he had not adjusted the time on his camera to reflect Daylight Savings Time, the photographs were apparently taken between approximately 12:01 p.m. and 1:26 p.m., rather than between 1:01 p.m. and 2:26 p.m.).⁶

- *United States v. McCloud* (metadata showed that video was produced in the early morning hours of a certain date).⁷

- *In the Matter of Sagaponack Ventures* (“Village Planner stated that his review of the metadata for the photograph renderings taken by the petitioner reveals that they were not taken with a ‘naked eye lens,’ but a zoom lens without a fixed focal point, and that his photographs show a different height for the poles used to access visual impact because of the ‘lensing’ used by the petitioner”).⁸

The decision in *Broadrock Gas Servs. v. AIG Specialty Ins.* may also be helpful to litigators,⁹ where metadata concerning a prior draft of a critical letter was required to be produced. There, plaintiffs sought copies of drafts and metadata involving a certain coverage-position letter, and defendant argued that drafts had

no pertinence because the insurance carrier was bound only by the final version of its letter. The court, reviewing the usefulness of draft documents ordered to be produced in other cases, held that “the drafts are potentially relevant insofar as they may contain admissions that were then deleted in the process of editing. That phenomenon would at least be helpful to plaintiffs in pursuing their assertion that the carrier’s performance was in bad faith.”

In the Matter of Fedder,¹⁰ the defense asserted that metadata need not be produced because a static “screen shot” of an electronically stored document was sufficient. There, while movant asserted that Citibank had not

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provided certain metadata and therefore could not substantiate the date data was inputted into its computer system, the court accepted Citibank’s position that “screen shot” of the data demonstrated the date generated.

Once metadata is produced, one issue that counsel may need to address is the issue of the authenticity of such ESI. A recent case addressed the technique of using a notice to admit to authenticate ESI. The court in *Robins v. The City of Long Beach*,¹¹ denied a protective order sought by plaintiffs as it related to a notice to admit, reasoning that plaintiffs’ argument “misses the point.” The court found that defendant had appropriately sought to determine if certain Facebook pages acquired from the public domain reflected true and accurate Facebook pages and posts made by plaintiffs, as that information was “uniquely within the knowledge of plaintiffs.” The court ordered that if plaintiffs are “unable, after good faith effort, to confirm that the pages are genuine copies of material maintained in their Facebook account, they may set forth in detail in their response why they cannot truthfully either admit or deny those matters.”

In another recent social media production decision, Facebook responded to a plaintiffs’ authorization by explaining in writing how a user could download the contents of

her Facebook account. The motion court in *Laviano v. Bonafide*¹² ruled that plaintiffs, by providing social media authorizations, “waived their objections to such disclosure.” The motion court ordered that because plaintiffs had refused to download their account, if they did not produce all Facebook entries for the 90-day period before and after the accident with an affidavit from counsel indicating that all of such materials have been produced, they would be precluded from offering any evidence in support of their case.

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1. This column over the past year has discussed a few decisions addressing the production of metadata in “Medical Malpractice E-Discovery, Preservation and Privilege Logs,” NYLJ, Vol. 254, No. 43, Sept. 1, 2015, and in “Cases Address Use of ESI and Ethics Issues With the Cloud,” NYLJ, Vol. 253, No. 40, March 3, 2015.

2. 255 F.R.D. 350, 354 (S.D.N.Y. 2008).

3. Index No. 654320/2103, 2015 N.Y. Misc. LEXIS 2072 at *4 fn. 2 (Sup. Ct. N.Y. Co. June 11, 2015).

4. 2271/No Subfile, File No.: 2012-2271/A, File No.: 2012-2271/B, File No.: 2012-2271/C (Surr. Ct. N.Y. Co. Jan 15, 2016).

5. Index No. 02823/20014 (Sup. Ct. Queens Co. Nov. 5, 2015).

6. 2015 U.S. Dist. LEXIS 109105 at *13 fn. 6 (W.D.N.Y. Aug. 14, 2015).

7. 2015 U.S. Dist. LEXIS 73826 at *7 (W.D.N.Y. June 5, 2015).

8. Index No. 15-2284 (Sup. Ct. Suffolk Co. Oct. 20, 2015).

9. 2015 U.S. Dist. LEXIS 26462 at *16 (S.D.N.Y. March 2, 2015).

10. File 2011-265265/A (Surr. Ct. Nassau Co. June 24, 2015).

11. Index No. 600405/2010 (Sup. Ct. Nassau Co. Nov. 25, 2015).

12. Index No. 600405/2014 (Sup. Ct. Nassau Co. Nov. 25, 2015).

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